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No. 85-568

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

NANTAHALA POWER AND LIGHT COMPANY,
TAPOCO, INC., and
ALUMINUM COMPANY OF AMERICA,
Appellants,

v.

STATE OF NORTH CAROLINA EX REL.
UTILITIES COMMISSION; LACY H.
THORNBURG, Attorney General, *et al.*,
Appellees.

On Appeal from the Supreme Court of North Carolina

REPLY TO MOTION TO DISMISS AND MOTION TO AFFIRM

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Appellees seek to avoid review of the North Carolina Supreme Court's decision by contending that it rests on "unique facts"[1] and that appellants are somehow, *sub silento*, challenging four irrelevant factual findings of the NCUC.[2] These arguments are spurious. There is only one relevant fact here, and it is undisputed: the NCUC adopted a radically different allocation of inter-

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[1] Motion to Dismiss and Motion to Affirm ("Motion"), pp. 1-11.

[2] *Id.* p. 13.

state wholesale power supplies and their costs between North Carolina and Tennessee than is prescribed by the governing FERC Rate Schedules and decisions.

Appellees ultimately admit that the North Carolina Supreme Court upheld the NCUC on the ground that, despite the Federal Power Act, state commissions can investigate interstate wholesale power transactions and cost allocations regulated as FERC rate schedules, and can disregard them whenever the state commission finds that the costs allocated to the State by FERC were not "reasonably incurred to serve [retail customers in that State]." Motion p. 22. This holding squarely conflicts with the decisions in *Northern States Power Co.* v. *Minnesota Public Utilities Commission*, 344 N.W.2d 374 (Minn.), *cert. denied*, 104 S. Ct. 3546 (1984) and numerous other cases.[3] It also threatens the orderly, uniform regulation of interstate energy transactions envisaged by the Federal Power Act, and thereby jeopardizes important interests of the federal government, the electric power industry, and the nation.

Each of the appellees' other arguments is an attempt to divert attention from the central fact that, contrary to the Federal Power Act, North Carolina has disregarded FERC's regulation for the only purpose that really matters.

1. Appellees' principal argument is that state ratemaking authorities can "roll-in" two or more affiliated electric utilities and treat them as a single system for ratemaking purposes. Whatever the merits of that question, it is not presented here. The decisive fact is that the FERC wholesale rate schedules and decisions allo-

[3] *Northern States* held that state retail ratemakers must recognize plant abandonment costs as allocated by FERC between two companies. Because there was no benefit to Minnesota ratepayers from an abandoned plant, *Northern States* clearly would have been decided the other way under the North Carolina Supreme Court's test. See Jurisdictional Statement, pp. 14-20.

cate Nantahala's and Tapoco's costs of obtaining power for the service they provide in North Carolina and Tennessee, respectively. And the NCUC has candidly admitted that its "roll-in" method was "nicely suited ... proper alternative to reformation of contracts" (App. 202a) regulated by FERC as wholesale rate schedules. The Federal Power Act, as consistently interpreted, prohibits North Carolina from adopting a different allocation of those costs that is more favorable to its citizens. This principle has special force here, for the North Carolina Attorney General participated on behalf of Nantahala's *retail* customers in the FERC proceedings in which those customers unsuccessfully sought to have FERC adopt different allocations.

2. The contention that there is no conflict between the NCUC order and FERC's regulation is simply wrong. It rests, ultimately, on the appellees' assurance, taken from the North Carolina Supreme Court's opinion, "that not a word of the contracts or agreements properly regulated by FERC has been changed."[4] But this misses the point. North Carolina has ignored FERC's allocations and kept for itself some $45 million more of low cost power than FERC determined it was entitled to keep.[5]

Indeed, appellees' arguments, by their terms, are attacks on the FERC rate schedules and decisions. Most of their brief is devoted to claims that "unique facts" dating back to 1900 somehow make the NCUC's allocation of 92.7 megawatts of low-cost capacity entitlements to North Carolina more fair than the 54.3 megawatts allocated by FERC's Nantahala Rate Schedule No. 1. Appellees insist, in this regard, that the NCUC's higher allocation was justified by "the corporate abuses which the NCUC found among three affiliated North Carolina

[4] Motion p. 28, quoting from App. 105a.

[5] Jurisdictional Statement, p. 12.

public utilities . . . ." [6] The short answer is that that precise issue—whether Alcoa's alleged domination should affect its share of NFA entitlements—was considered and decided against the appellees by FERC.[7] Appellees are thus reduced to making the astonishing assertion that FERC "inexplicably" does not understand its own order.[8]

Verbal characterizations aside, there are enormous differences in the results reached by the [illegible]al and state commissions. If North Carolina is free to serve its own selfish interests as it has done in this case, and others,[9] so is every other state. Fortunately, the Federal Power Act as interpreted by other state supreme courts—and by the agency charged with its enforcement—preempts such a consequence.[10] The FPA permits states to set re-

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[6] Motion p. 14. The status of Alcoa and Tapoco as North Carolina "public utilities" is irrelevant to the preemption and commerce clause principles that control this case. Tapoco supplies power only to the Alcoa operations in Tennessee.

[7] See Jurisdictional Statement, pp. 7-8 and App. 291a, 293a-295a.

[8] Motion, p. 18, n. 19.

[9] In subsequent cases, the North Carolina Supreme Court has ordered this same method of allocating power between Nantahala and Tapoco/Alcoa to continue indefinitely. *North Carolina ex rel. Util. Comm'n* v. *Nantahala Power and Light Co.*, 314 N.C. 246, 333 S.E.2d 217 (1985); *North Carolina ex rel Util. Comm'n* v. *Edmisten*, 314 N.C. 122, 333 S.E.2d 453 (1985).

[10] For reasons developed in the Jurisdictional Statement and the amici briefs, the North Carolina Supreme Court decision squarely conflicts with *Narragansett Electric Co.* v. *Burke*, 381 A.2d 1358 (1977), *Northern States Power Co.* v. *Minnesota Public Utilities Commission*, *supra* and other state supreme court cases on the preemption issue. It is irrelevant that *Narragansett* itself and other decisions hold that increased costs under FERC wholesale rate schedules need not *automatically* be passed through to retail ratepayers under fuel adjustment clauses, in view of the possibility of offsetting savings in other parts of the local utility's business. The *Narragansett* opinion clarifies that while the "PUC [need not] automatically adjust the retail rates," it must do what the NCUC

tail rates, but when they do so, they must recognize FERC-determined wholesale costs and power supply allocations as recoverable expenses.

3. The argument that there is no Commerce Clause violation is also spurious. The NCUC's order is not "traditional ratemaking," and does not allocate 25% of the power to North Carolina and 75% to Tennessee.[11] Rather, the NCUC order requires an increase in North Carolina's share of the cheap hydroelectric power, and a corresponding decrease in Tennessee's share, whenever the needs of North Carolina's retail customers increase.[12] The NCUC order thus epitomizes the kinds of explicit economic protectionism for local interests that would violate the Commerce Clause even if the Federal Power Act did not exist. *New England Power Co.* v. *New Hampshire*, 455 U.S. 331 (1982).

4. The assertions that the facts are unique to this case and that there are no issues of national importance are nothing less than startling. The appellees assure the Court that "this case does not involve a jurisdictional dispute between North Carolina and Tennessee" [13] Tennessee disagrees.[14] The appellees represent that "the final result reached in this case cannot be extended to the electric power industry generally." [15] The electric power industry disagrees.[16] Finally, the appellees state that

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refused to do: "no matter what method it adopts [the PUC] must treat the [FERC] filed and-bonded purchase . . . as an actual operating expense." 381 A.2d at 1363.

[11] Compare Motion, p. 2[illegible].

[12] Jurisdictional Statement, pp. 9-12 & nn. 14-15.

[13] Motion, p. 10, n. 15.

[14] Amicus brief, State of Tennessee.

[15] Motion, p. 11.

[16] Amicus brief, Edison Electric Institute.

"FERC thus recognized that . . . the NCUC['s] exercise of retail ratemaking authority does not conflict with FERC's decision.[17] FERC disagrees.[18]

CONCLUSION

It cannot be seriously contended that the federal questions presented are anything but substantial. Agreement on that issue reaches from the North Carolina Supreme Court to the Federal Energy Regulatory Commission. Probable jurisdiction should be noted so that the substantial federal questions can be considered by a federal court.

Respectfully submitted,

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[17] Motion, p. 16.

[18] Amicus brief for the United States and FERC.